

# THE ENDANGERED SPECIES ACT A SHORT, SHORT COURSE

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The Endangered Species Act of 1973, as amended ("ESA" or "Act"), 16 USC § 1531, provides "...a means whereby the **ecosystems** upon which endangered species depend may be conserved". 16 USC § 1521(b) The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively the "Service") survey the status of species and list those species determined to be threatened or endangered, 16 USC § 1533. Once a species is listed, the statute prohibits harm to the species or its habitat. 16 USC § 1538.

About two decades ago, with glee or dismay, certainly with surprise, we learned the ESA and the habitat of 10,000 to 15,000 tiny perch ( called "snail darters") living in the Little Tennessee River had combined to enjoin the terminal stages of construction of giant Tellico dam after \$100,000,000 already had been spent.<sup>1</sup> Today, particularly in a region the Northern Spotted Owl calls home, we have largely come to understand that the ESA means what it says. The essence of the Endangered Species Act seeks to "...halt extinction... whatever the cost". Tennessee Valley Authority v. Hill, 437 U.S. 153, 57 L.Ed.2d 117(1978)<sup>2</sup>

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<sup>1</sup>The Tellico dam started construction about seven years before Congress passed the ESA. The project was a multipurpose regional development encompassing an impoundment covering 16,500 acres, with a reservoir 30 miles long, covering productive farmland. The project included shoreline development, augmentation of electrical generation to serve 20,000 homes, flood control, flatwater recreation, and improved economic conditions in an area where human resources were underutilized.

<sup>2</sup>It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million . . . . We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result. ... Its very words affirmatively command all federal agencies "to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species" . . . . This language admits of no exception . . . .

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history and structure of the legislation . . . indicates beyond a doubt that Congress intended endangered species to be afforded the highest of priorities . . . .

The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, **whatever the cost**. This is reflected not only in the stated policies of the Act, but in literally

## LISTING

**Listing** by the Service is where everything starts under the ESA. Species can be listed either as "threatened" or "endangered." "**Threatened species**" are species likely to become endangered within the foreseeable future throughout all or a significant portion of their range. 16 USC § 1532(20). "**Endangered species**" are those species in danger of extinction throughout all or a significant portion of their range. 16 USC § 1532(6). The term "species" includes species, subspecies, and isolated population groups of vertebrate species capable of interbreeding. 16 USC § 1532(16).

## BEST SCIENCE

Listing decisions must be based on the "**best available scientific and commercial information**" regarding the species and the reasons the species is threatened with extinction. 50 C.F.R. § 424.11(b) (1992). Listing is performed through rule making and publication in the Federal Register. "Best science" is a concept which pervades much of the thinking and many of the activities under the ESA. To satisfy the "best science" criteria requires enormously expensive and protracted endeavors, having literally almost no limit. Moreover, the Service is specifically precluded from considering economic impacts or other impacts of listing.

## CRITICAL HABITAT

The Service designates "**critical habitat**" for listed species based on the best scientific data available. 16 USC § 1533(b)(2); 50 C.F.R. § 424.12(a). This designation attempts to identify and protect habitat essential to the survival and recovery of the species. 50 C.F.R. § 424.12(b). "Critical habitat" means the specific areas within or outside the geographical range of the species at the time of listing which are found to contain the physical or biological features essential to the conservation of the species and which may require special management or protection. 50 C.F.R. § 424.02(d). Unlike the listing process, when designating critical habitat the Service must consider economic and other impacts. 16 USC § 1533(b)(2); 50 C.F.R. § 424.12(a). Areas may be excluded from designation as critical habitat if the costs of designation would outweigh the benefits, provided that exclusion would not result in extinction of a species. 16 USC § 1533(b)(2).

Designation generally is to be done at the time of listing. 16 USC § 1533(a)(3). The USFWS is somewhat reluctant to make critical habitat designations, given the great

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every section of the statute, . . . a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.

[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable."

[Tennessee Valley Authority v. Hill](#), 437 U.S. 153, 57 L.Ed.2d 117(1978). *Emphasis added.*

cost, since few if any biological opinions find adverse modification of critical habitat without also finding jeopardy to the species. As a result, critical habitat review procedure is seen to provide little or no added benefit. See: 62 Fed Reg 39,129 (1997).

## SECTION 7: CONSULTATION

**Section 7(a)** imposes dual obligations on federal agencies. Section 7(a)(1) requires the Department of the Interior to review and utilize its programs to further the purposes of the ESA. All other federal agencies must, in **consultation** with the Department of the Interior, "utilize their authorities in furtherance of the purposes of the ESA, by carrying out programs for the conservation of threatened and endangered species." 16 USC 1536(a)(1)<sup>3</sup>

Section 7(a)(2) requires every federal agency to consult with the Service to ensure any action is not likely to affect adversely a listed species or designated critical habitat. 16 USC § 1536(a)(2); 50 C.F.R. § 402.01(a). The term "**federal action**" includes all activities authorized, funded, or carried out, in whole or in part, by federal agencies. 50 C.F.R. § 402.02. Examples include: promulgation of regulations; granting of licenses, contracts, permits, leases, easements rights-of-way, or grants-in-aid; and actions directly or indirectly causing modifications of land, water, air, or other elements of a listed specie's environment. The consultation process is complex and multifaceted, and includes conferences, informal consultation, early consultation, and formal consultation. When the Service and another agency must get together, the HCP sponsor can often be relegated to the role of a passive observer while the wheels of consultation grind away. The observer's role can be lengthy, expensive and frustrating.

Under Section 7(d) of the Act, no irretrievable or irreversible commitment of resources can be made during formal consultation that precludes reasonable alternatives. 16 USC § 1536(d). There is a better chance of reaching an alternative that is acceptable to all parties if some one or more features are not prematurely set in stone. Failure to observe this provision disqualifies the agency or applicant from appeal to the Endangered Species Committee ("**God squad**").

## BIOLOGICAL ASSESSMENT

Under Section 7(c), initial responsibility for determining whether a project will affect a listed or proposed species lies with the action agency. The Service then concurs or does not concur with their finding. One of the tools for assisting the action

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<sup>3</sup>Section 7 (a)(1) of the ESA imposes an affirmative duty on federal agencies to conserve species, but biology finds most endangered species rely heavily on state and private land for essential habitat. Non-federal agencies are compelled by federal law to use conservation measures only when seeking to take endangered species by using a Section 10 permit. So a more broad and proactive mechanism is needed. In addition, the ESA does nothing for species before they become threatened or endangered. See, HCP Alternatives, below.

agency in making that determination is the "**biological assessment.**" 16 USC § 1536(c); 50 C.F.R § 402.12.

A biological assessment must be prepared for "major construction activities" 50 C.F.R. § 402.12(b), which are major federal actions significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act (NEPA). 50 C.F.R. § 402.02. The contents of a biological assessment are discretionary, but generally include the results of physical inspections to determine the presence of a listed or proposed species, an analysis of the likely effects of the action on the species or habitat based on biological studies, review of the literature and the views of species experts. The assessment also should describe any known future non-federal activities in the action area that are likely to impact the species. 50 C.F.R. § 402.12(f).

The applicant or a non-federal representative (often a consulting firm) may and usually does prepare the data included in the biological assessment, but the action agency is responsible for the findings presented in that assessment. (50 C.F.R. § 402.08). If there is any reason to believe that the agency or the applicant may later appeal a biological opinion to the Endangered Species Committee, a biological assessment should be prepared. See 16 USC § 1536(h)(2)(A). For non-construction projects the action agency still needs to assess the likely impacts of the action and present those findings to the Service. The Service can determine the likely effects on listed or proposed species.

## SECTION 9: TAKE

**Section 9** of the Act prohibits unauthorized **taking** of listed species. 16 USC § 1538(a)(1), 16 USC § 1538(a)(1)(B). The statute broadly defines "taking" to include any activity that would or would attempt to harass, **harm**, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species covered by the Act. 16 USC § 1532(19). The Service's regulations define the take prohibition very broadly to encompass both direct taking of the species (through wounding, killing, trapping, etc.) and indirect taking (through harm arising from habitat alteration or destruction or otherwise). 50 C.F.R. § 17.3 (1993).<sup>4</sup>

## HARM

The regulatory definition says "harm" to species includes habitat modification and this definition has been upheld. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 515 U.S. 687, 132 L.Ed. 597 (1995). In Sweet Home, indirect harm

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<sup>4</sup>The Section 9 take prohibition applies to private sector, federal, state and local government alike, 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C § 1532(13), and applies wherever the taking occurs, whether on private or public land, 16 U.S.C. § 1538(a)(1)(B). Marbled Murrelet, (Brachyramphus marmoratus): Environmental Protection Information Center vs. Pacific Lumber Company, No. 95-16504, N.D. Cal. No. CV-93-01400-LCB.

resulting from habitat modification was found consistent with the ESA's statutory language and legislative history. The direct application of force to a critter is not needed for harm to occur within the meaning of the Act. Further, "the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." (emphasis added). Ibid. This conclusion harkens back to the Snail Darter and Tellico dam; in TVA v. Hill the Court said, "Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat," . . . and concluded that "... the greatest [threat] was destruction of natural habitats." 437 U.S. at 179. (emphasis added).<sup>5</sup>

## SECTION 10: INCIDENTAL TAKE PERMIT

**Section 10** authorizes issuance of an "incidental take" permit.<sup>6</sup> The incidental take permit allows a private landowner to avoid Section 9 liability for any taking which might occur "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 USC § 1539(a)(1)(B); 50 C.F.R. § 17.3 (1993). To get an incidental take permit, the applicant must prepare and submit a **habitat conservation plan** specifying the activities he will pursue and the measures he will use to mitigate any "take" authorized by the Service. 16 USC § 1539(a)(2)(A); 50 C.F.R. § 17.22(b)(1).

## HABITAT CONSERVATION PLAN

A Habitat Conservation Plan ("HCP") under Section 10 (a) (1) (B) of the Endangered Species Act, 16 USC 1539 (a) (1) (B), is negotiated between the Service and the private landowners or state or local governments involved. One important objective of an HCP is meaningful, long-term protection measures for the benefit of the listed species. Once the HCP is approved, an incidental take permit is issued authorizing "incidental take" in the course of otherwise lawful land use activities. The HCP is given the enforceable effect of a contract by incorporation in an Implementation Agreement signed by the Service and the sponsor, the land use restrictions of the HCP are made binding on the land by a covenant recorded like a deed.

### HCP Essential Elements

Contractual considerations aside, the essential ESA elements for an HCP (16 USC § 1539(a)(2)(A)) include:

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<sup>5</sup>In the lower courts, the amorphous "proximate cause" test of habitat modification remains viable. For example, the USFW has been required to present radio telemetry and site specific habitat use data for identifiable spotted owls, in order to provide "reasonable certainty" about all elements of "harm" and support a permanent injunction against logging. *US vs West Coast Forest Resources Ltd. Partnership*, No. 96-1575-HO (D. Or, July 28, 1997).

<sup>6</sup>Section 10 (a) (1) was amended in 1982 to authorize issuance of an "incidental take" permit to non-federal landowners.

- \* 1. An assessment of the likely impact from incidental taking;
- \* 2. A description in detail of the proposed steps the applicant will take to "minimize and mitigate" such impacts;
- \* 3. A provision for long-term funding committed in support of the HCP;
- \* 4. A description of the alternative actions considered and reasons such alternatives were not chosen; and
- \* 5. Any other measures deemed necessary or appropriate by the Secretary

### **HCP Required Findings**

The Secretary shall issue an incidental take permit if he finds, after opportunity for public comment, that:

- \* A. The taking of listed species will be incidental;
- \* B. The impact of such taking will be minimized and mitigated to the maximum extent practicable;
- \* C. Adequate funding for the HCP is assured;
- \* D. The taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild; and,
- \* E. Any special measures required by the Secretary will be met.

### **UNFORESEEN CIRCUMSTANCES**

The legislative history of the ESA mentions a need to address "unforeseen circumstances" during the term of an incidental take permit, circumstances which might jeopardize a listed or threatened species while the permit is in force. Contractually dealing with some unforeseen future event is not easy. Maybe the HCP and Implementation Agreement will be void due to impermissible uncertainty or vagueness. Maybe the uncertainty and unknown cost of dealing with an unforeseen occurrence, an event of unknowable dimensions happening at some unknown time, kills the HCP at the outset. The species loses. We all lose.

### **NO SURPRISES**

The uncertainty problem is the subject of "No Surprises", a USFW policy now a final regulation issued February 17, 1998. The No Surprises concept is simply that "a deal is a deal". Under a properly functioning HCP, the Service will not come back later and ask for more mitigation or funding, even if the affected species continues to decline. Even in "extraordinary" or "unforeseen" circumstances, No Surprises says the landowner can only be asked to explore available alternatives for making previously agreed mitigation measures more effective, but no additional cost can be forced on the owner once a deal has been done. The terms of the No Surprises regulation can be built into the contractual language of the Implementation Agreement. 50 CFR, Part 17 The essence of this certainty policy may or may not survive future rule making processes and subsequent litigation attacking it. For sure, without some meaningful certainty in the

bargain represented by an HCP, disputes will confound meaningful progress for species that need help.

## **SECTION 11.**

**Section 11** provides criminal penalties of up to \$50,000 in fines and up to one year in prison for violations of the ESA. The Act also grants any person standing to enjoin violations or to compel non-discretionary listings by the Service under Section 4 or to enforce taking prohibitions under Section 9. Civil damages of \$25,000 are provided for each violation, along with discretion to award attorney fees. 16 USC 1540 (a), et. seq.

## **HCP ALTERNATIVES**

There are some alternatives to doing an HCP:

- 1.0 Do Nothing.** Always part of a complete list of alternatives, doing nothing is rarely if ever a sensible choice when the prohibited "take" of an endangered species is realistically possible. ESA Section 9, 16 USC 1538. The ESA broadly defines "take" to include "harm" like destruction of habitat, and, the Act provides both civil and criminal sanctions for those who would ignore its proscriptions. ESA Section 11; 16 USC 1540,
- 2.0 The 4 (D) Rule, Threatened Species Discretion.** The ESA simply gives the Secretary of the Interior discretion to deal with threatened, as opposed to endangered, species, with the discretion to "provide for conservation". Originally, this discretion simply meant endangered species protection, including all the "take" prohibitions, could be invoked or "custom built" for threatened species by special rules. Today, the discretion of doing "special rules" is being used to provide real conservation incentives. For example, to encourage a state conservation plan, a 4 (d) special rule deferred to the state plan for the gnatcatcher, saying compliance with the state plan constituted compliance with the ESA. 58 Fed Reg 16758 (1993)
- 3.0 Candidate Conservation Agreements.** The draft policy of a Candidate Conservation Agreement (62 Fed Reg 32,183, and 32,184, 6/12/97) overcomes an understandable reluctance of the Service to enter agreements where a nonfederal entity would commit to conservation measures on behalf of an unlisted or candidate species, in return for joint USFW and NMFS agreements not to list the species at a later time. The objective is a voluntary conservation agreement which will enhance survival before the species must be taken to the emergency room. Owners can avoid Section 9 land use restrictions, which are devoid of grandfather rights, and can negotiate protection measures which are balanced by economic considerations. The Service will enter a Candidate Conservation Agreement if shown that the conservation measures, when

adopted by owners similarly situated in the species' range, will avoid the need for listing. The Service issues a Section 10 permit assuring that land uses may take place in the future, even if the species nevertheless should be listed. The permit says what "take" is allowable if the species is subsequently listed and also caps the conservation measures that can be required of the permit holder. Safe Harbor Agreements and Candidate Conservation Agreements, 62 Fed Reg 32,189. 32,192-193, 6/12/97, proposed amendments to 50 CFR Sec 17.22

- 4.0 Safe Harbor Agreement.** Analogous to a conservation agreement, the Safe Harbor Agreement speaks of the future and tries to remove motives for landowners to resist allowing their land to become home to listed species. The Safe Harbor Agreement provides incentives to restore, enhance or maintain habitat or otherwise improve the conditions affecting listed species, aiming for a net conservation benefit. Owners who sign up can get a Section 10 permit allowing land uses in the future, if they do not degrade the species population and habitat below baseline levels which existed on the property before the agreement. 62 Fed Reg 32,178 (1997)

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